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No. 361

In the Supreme Court of the United States

OCTOBER TERM, 1951

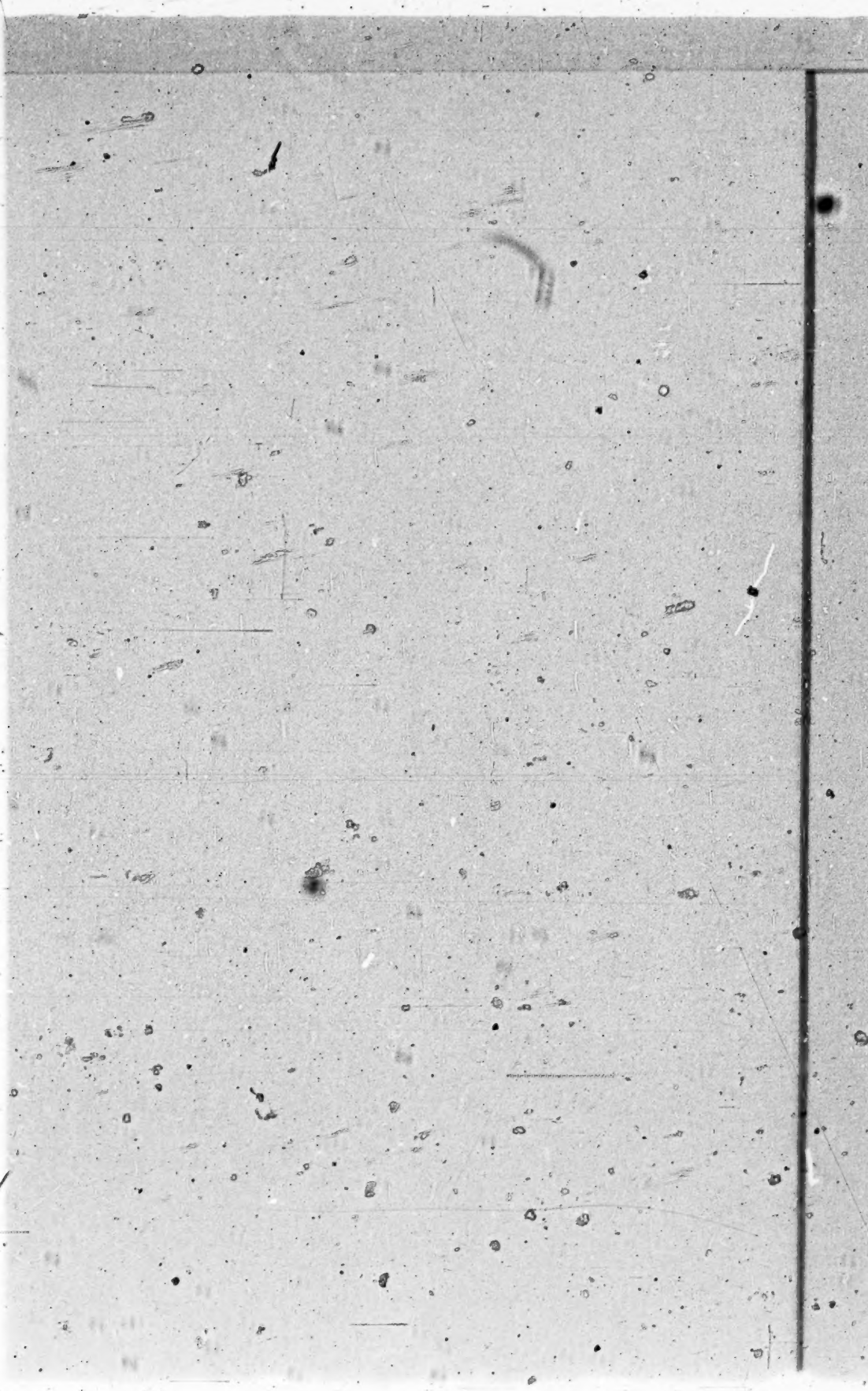
ARMAND EDWARD BLACKMAR, PETITIONER

v.

L. F. GUERRE, MANAGER, VETERANS ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA, AND UNITED STATES CIVIL SERVICE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS



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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 361

ARMAND EDWARD BLACKMAR, PETITIONER

v.

L. G. GUERRE, MANAGER, VETERANS ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA, AND UNITED STATES CIVIL SERVICE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The memorandum order of the United States District Court for the Eastern District of Louisiana (R. 23) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 37–39) is reported at 190 F. 2d 427.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1951 (R. 40). The petition for a writ of certiorari was filed on October 1,

1951, and was granted on November 26, 1951 (R. 40). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner, a veteran of World War I, was discharged from his position in the New Orleans Regional Office of the Veterans Administration by the Regional Manager, and the propriety of his discharge was affirmed by the United States Civil Service Commission. In this action, which was brought in the District Court for the Eastern District of Louisiana against the Regional Manager of the Veterans Administration and the Civil Service Commission, petitioner challenges the validity of his removal and states that he seeks a money judgment for back pay, an order restoring him to his job, and a declaratory judgment as to his rights.

The broad question presented is whether this action can be maintained in the District Court for the Eastern District of Louisiana. Stated more specifically, the questions are these:

1. If this is a suit against the United States or its agencies, has Congressional consent been given to a suit seeking such relief in the federal district courts?

2. If Congressional consent has been given to a job-restoration suit of this type against agencies of the United States, is the Eastern District of Louisiana the proper venue for the present action

and did the District Court have jurisdiction *in personam* over the Commission?

3. If the suit is against the respondents as individual officers alleged to be exceeding their statutory authority:

(a) Was venue properly laid in the Eastern District of Louisiana?

(b) Did the District Court obtain jurisdiction *in personam* over the Civil Service Commissioners?

(c) Did the District Court have jurisdiction to order petitioner restored to his job or to declare that he was entitled to restoration?

4. Did respondents waive the defenses of improper venue, want of jurisdiction *in personam*, and want of jurisdiction to grant the relief requested by petitioner?

5. Is the change of venue provision of 28 U. S. C. 1406 (a) applicable, and, if so, should the action have been transferred to the District Court for the District of Columbia?

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Sections 1346 (d) (2), 1391 (b) and 1406 (a) of Title 28, United States Code, and Rules 4 (d) (1), 4 (d) (3), 4 (d) (4), 4 (d) (5), 4 (f), 12 (b), and 12 (h) of the Federal Rules of Civil Procedure, and the pertinent provisions of Section 10 of the Administrative Procedure Act (5

U. S. C. 1009) are set forth in the Appendix, *infra*, pp. 78–82.

STATEMENT

On January 2, 1947, respondent L. F. Guerre, the Regional Manager of the Veterans Administration at New Orleans, Louisiana, notified petitioner, an honorably discharged veteran of World War I, in writing of charges against him and of his proposed discharge as authorization officer, P & S–4, in the Regional Office in New Orleans (R. 9). After petitioner filed an answer to the charges, respondent Guerre advised petitioner by letter dated February 14, 1947, that he would be separated from his duties effective at the close of business March 2, 1947 (R. 8, 9).

On February 21, 1947, petitioner filed an appeal under Section 14 of the Veterans Preference Act of 1944 (5 U. S. C. (Supp. IV) 863) with the Tenth Regional Office of the United States Civil Service Commission. The Regional Board concluded, after a hearing, that petitioner's separation was not warranted, and recommended that he be restored to his position (R. 8). From this decision, the Veterans Administration appealed to the Board of Appeals and Review of the Civil Service Commission in Washington (R. 8). Following a hearing in Washington, the Commission informed petitioner that it had reversed the findings of the Tenth Regional Civil Service Board and had approved the action of the Veterans

Administration removing him from office (R. 8). Petitioner was then granted a further hearing before the Commission, which reaffirmed the propriety of petitioner's separation (R. 8).

On March 31, 1948, petitioner instituted this suit in the District Court for the Eastern District of Louisiana (R. 6–16). The United States Civil Service Commission and L. F. Guerre, the Regional Manager of the Veterans Administration, were named as defendants (R. 1). Service of the summons and complaint was made as follows: Personal service was effected in New Orleans on respondent Guerre and on Robert Weinstein, then United States Attorney for the Eastern District of Louisiana; service by registered mail was made on the Attorney General of the United States at Washington, D. C., and on the United States Civil Service Commission at Washington, D. C.; in addition, personal service was made on A. J. Leach, Regional Director of the Tenth United States Civil Service Region in New Orleans (R. 2, 3).

The complaint alleged that the action of respondent Guerre was illegal on the grounds that the charges against petitioner were not stated specifically and in detail as required by Section 14 of the Veterans Preference Act of 1944, that the charges did not constitute such cause as would promote the efficiency of the service and thus could not provide a lawful basis for dismissal

under Section 14 of the Veterans Preference Act of 1944, that petitioner was not afforded a fair hearing by the Veterans Administration, and that there was no substantial evidence to support the charges (R. 9). With respect to the action of the Civil Service Commission in granting the Veterans Administration an appeal and in reversing the findings of the Tenth Regional Civil Service Board, the complaint averred that such action was illegal for the reasons that the regulations of the Civil Service Commission allowing an appeal from the decision of the Regional Board are unauthorized by the Veterans Preference Act of 1944, that the appeal by the Veterans Administration was not timely filed, that the Commission denied petitioner a fair hearing, and that the decision of the Commission was not supported by substantial evidence. (R. 10–13).

Petitioner prayed that the court set aside and annul the action of respondent Guerre suspending and discharging petitioner from his position with the Veterans Administration, and set aside and annul the action of the Civil Service Commission granting the Veterans Administration an appeal from the decision of the Tenth Regional Civil Service Board and approving his discharge (R. 15). Petitioner further prayed for a declaratory judgment that he "is entitled to an order from the United States Civil Service Commission directing the defendant, L. F. Guerre, in his

aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration and providing that plaintiff be restored the pay for his said position from January 2, 1947 to the date of the payment thereof * * *" (R. 15).

On June 1, 1948, respondents moved to dismiss the complaint because of improper venue and lack of jurisdiction (R. 3). After this motion was denied (R. 3), respondents filed an answer on August 2, 1949, denying the material allegations of the complaint (R. 17–20). In particular, the answer denied that A. J. Leach, Regional Director, Tenth United States Civil Service Region, represents the Civil Service Commission for the purpose of receiving service of process so as to bring the Commission or any of its members within the jurisdiction of the court (R. 17–18). By way of separate defense, the answer reasserted the defenses of improper venue and lack of jurisdiction (R. 17, 19–20). On May 4, 1950, petitioner moved for summary judgment; and on June 6, 1950, respondents filed a countermotion for summary judgment, together with a motion to dismiss which again urged the objections to jurisdiction and venue (R. 4).

After argument, the District Court granted respondents' motion to dismiss, holding that it lacked jurisdiction over the persons of the Civil Service Commissioners who are indispensable

parties but who had not been and could not be subjected to the jurisdiction of the court (R. 23). Petitioner's motion for a new trial (R. 24–25) was denied (R. 4). On appeal, the Court of Appeals affirmed the judgment without prejudice to further proceedings by petitioner in the proper venue (R. 37–40).

SUMMARY OF ARGUMENT

In this action, petitioner seeks to challenge the validity of his dismissal from Federal employment. He prays for a monetary judgment, an order of restoration, and a declaration that he is entitled to be restored to his position and to reimbursement of the pay that he has lost by reason of his discharge. The question here presented is not the validity of the contested administrative action but whether this suit is properly maintainable in the District Court for the Eastern District of Louisiana. Petitioner's argument is twofold: first, that this is a consented suit against the United States and its agencies; second, that, if the suit is against the respondents as individual officers, it is still maintainable in that court.

I

The difficulty with petitioner's contention that this suit is a suit against the United States is that, if it is, it is an unconsented suit. And even if Congressional permission has been given for this type of suit, it is not maintainable in that

court because the Civil Service Commission, an indispensable party, cannot be reached there.

A. As a preliminary matter, we may point out that petitioner cannot obtain review in *any* court of one of the two grounds of attack he makes upon his removal, *i. e.*, the merits of the reason for his discharge. The courts have repeatedly announced that they will not review the merits of discharge from federal employment. The second ground of attack, that compliance was not had with procedural steps prescribed by statute or regulation, is justiciable. In such circumstances, money judgments have been entered against the United States by the Court of Claims, and appropriate relief has been afforded the complainant against the offending public official by the District Court for the District of Columbia. The authority of the District of Columbia court rests upon its special powers and its location at the seat of the Government.

B. In so far as petitioner seeks a money judgment against the United States on the ground of a procedural defect in his removal, the district courts do not have jurisdiction. 28 U. S. C. 1346 (d) (2), as amended on October 31, 1951, expressly provides that (P. L. 248, 82d Cong., 1st Sess.): "The district courts shall not have jurisdiction under this section of: * * * (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers

or employees of the United States." See Brief for the United States in *Bruner* v. *United States*, No. 391, this Term. And since the Declaratory Judgment Act is procedural only and does not enlarge the jurisdiction of the district courts, the district court plainly lacks jurisdiction to enter a declaratory judgment that petitioner is entitled to back pay.

C. Nor has Congress authorized the courts to grant specific non-monetary relief against the United States or its agencies as such, by way of ordering restoration to the job. The suits brought against public officials in the District of Columbia were based on the theory that the defendant officer had acted in excess of his statutory authority in effecting the complainant's removal without following the prescribed procedure, and that the actions were, therefore, *not* unconsented suits against the United States. Congress, which has limited Tucker and Tort Claims Act suits to claims for money only, has made no exception in employment cases and has passed no statute permitting a suit for restoration to be brought against the United States, the employing agency, or the Civil Service Commission, as agencies of the United States. Contrary to petitioner's assertions, the Administrative Procedure Act is not "a sweeping waiver of governmental immunity." Whatever may be the scope of judicial review under Section 10 of the Administrative Procedure Act once agency action is subjected to judicial

scrutiny, there is nothing in that section which indicates that Congress dropped the pre-existing barriers to suits against the United States or its agencies, so as to grant a wholesale consent to suit and review at the instance of any person aggrieved by agency action. If Congress can be said at all to have consented to suits of this nature, it is only as to suits raising such procedural issues which could already be maintained, prior to the Act, against the United States in the Court of Claims or against the individual officer in the District Court for the District of Columbia. But, plainly, Congress did not enlarge the number of forums in which review of such issues might be had. Examination of the precise language of Section 10 and its legislative history demonstrates that Congress did not disturb existing law as to consent-to-suit and did not enlarge the jurisdiction of the district courts.

D. Petitioner cannot prevail even if the court should be convinced that the Administrative Procedure Act (or some other statute) has given the district courts general jurisdiction over job restoration suits brought against federal agencies, rather than merely confirming the existing traditional form of action against individual officers (in the District of Columbia) for actions in excess of authority. Under *Williams* v. *Fanning*, 332 U. S. 490, and earlier cases, it is clear that the Civil Service Commission is an indispensable

party to this suit. The restoratory relief sought here would require the Commission to direct respondent Guerre to restore petitioner to his prior position, and petitioner could not be so restored without action by the Commission. Its concurrence is necessary because Section 14 of the Veterans Preference Act makes the decision of the Commission binding upon the employing agency. Since 28 U. S. C. 1391 (b) provides that an action such as is here involved "may be brought only in the judicial district where all defendants reside," and since the official residence of the Commission is in the District of Columbia, venue as to the Commission cannot properly be laid in the Louisiana District Court. Section 10 (b) of the Administrative Procedure Act does not, as its terms and history show, waive that venue requirement. Further, because of the service of process provisions of the Federal Rules of Civil Procedure and the traditional territorial limitations upon the exercise of *in personam* jurisdiction, it is clear that the only court which would have jurisdiction *in personam* over the Commission is the District Court for the District of Columbia.

II

Assuming that this suit is not a suit against the United States but against the respondents as individual officers acting in excess of statutory authority, the suit can be maintained only in the District Court for the District of Columbia. For

substantially the same reasons advanced in Point I, D of this brief (*supra*, pp. 11–12), the suit cannot lie in the Louisiana District Court because the Civil Service Commissioners, who are indispensable parties, cannot be sued in that venue and the court does not have, and cannot obtain, personal jurisdiction over them. Moreover, the Louisiana District Court cannot grant the only relief requested against the individual respondents, *i. e.*, an order of restoration or a declaration that petitioner is entitled to reinstatement. The Declaratory Judgment Act does not enlarge the jurisdiction of the court; it simply provides a new and additional remedy in situations where the court could already grant relief. Accordingly, the Louisiana District Court has the power to grant a declaratory judgment only if it otherwise has jurisdiction to compel compliance with the procedural steps required in order to effect a dismissal from federal employment. Such compliance could be enforced only by an action in the nature of a writ of mandamus. The District Court for the District of Columbia has jurisdiction in an action in the nature of mandamus but all other district courts do not have such jurisdiction. Since an action in the nature of mandamus is a source of jurisdiction rather than a mere remedy, it follows that the district court below could not enter a declaratory judgment in the instant case. Cf. *Marshall* v. *Crotty*, 185 F. 2d 622 (C. A. 1).

III

As a factual matter, it is clear that the respondents did not intend to waive the defenses of improper venue and want of jurisdiction. The record shows that these points were raised at every possible stage. Apart from this factual absence of intent to waive these defenses, it is clear that respondents did not waive them as a matter of law. Rule 12 (b) of the Federal Rules of Civil Procedure expressly provides that objections to venue or jurisdiction may be made by answer or by motion. In this case, it was done by both. Since respondents did not become plaintiffs in the action or invoke the jurisdiction of the court when they moved for summary judgment of dismissal, we submit the court below correctly decided that there had been no waiver.

IV

Since the Louisiana District Court lacked *in personam* jurisdiction over the Civil Service Commissioners, who are indispensable parties, the change of venue provision of 28 U. S. C. 1406 (a) is inapplicable here. Section 1406 (a) is necessarily predicated on the supposition that there are at least two forums in which the defendant is amenable to process. If the Louisiana District Court does not have, and cannot obtain, jurisdiction *in personam* over the Commissioners because of its inability to effectuate proper service of

process, clearly it does not have the power under Section 1406 (a) to confer *in personam* jurisdiction upon another court.

ARGUMENT

In this action, petitioner seeks to challenge the validity of his dismissal from Federal employment. His challenge is predicated, in essence, on two grounds: First, that the decision of the Civil Service Commission, which reversed the findings of the Tenth Regional Civil Service Board and approved the action of the Veterans Administration discharging petitioner in order to promote the efficiency of the service,[1] was not supported by the evidence; second, that the Civil Service Commission and the Veterans Administration did not comply with the procedural steps prescribed by law and regulations. Petitioner asks that the actions of the Civil Service Commission and the Veterans Administration be set aside, and requests a declaration that he is entitled to reinstatement and to reimbursement of the pay that he has lost by reason of his discharge, as well as an order restoring him to his job, and a monetary judgment.

In the present posture of this suit, however, we are not concerned with the validity of the con-

[1] Section 14 of the Veterans Preference Act of 1944 (5 U. S. C. (Supp. IV) 863) provides that no permanent or indefinite preference eligible shall be discharged "except for such cause as will promote the efficiency of the service."

tested administrative action. The only question presented for resolution to this Court is whether this suit is properly maintainable in the District Court for the Eastern District of Louisiana. Two inconsistent strands are twisted throughout petitioner's argument that the courts below erred in holding his action not maintainable. The first is that this is a consented suit against the United States and its agencies, which may be brought in the Louisiana District Court; the second is that, if the suit is against the respondents as individual officers, it is still maintainable in that court. We submit that the judgment below is clearly correct, and that petitioner is wrong on both counts. This is not the type of suit to which the United States has given its consent, and, even if it were, the action could not be brought in Louisiana. And if the suit be considered one against the respondents as individual officers, then it is equally not sustainable there.

I

IF THIS IS A SUIT AGAINST THE UNITED STATES OR ITS AGENCIES, IT CANNOT BE MAINTAINED IN THE DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Petitioner's basic argument in answer to the respondents' defenses of improper venue and lack of jurisdiction is that this action is not one against the Civil Service Commissioners themselves but against the Civil Service Commission

as an entity and agency of the United States—that, to all intents and purposes, this is a proceeding against the United States for which consent has been given. Petitioner correctly points out that whether a suit is, in effect, a suit against the sovereign rather than against public officials does not depend on whether the sovereign has been expressly named a party defendant. *Larson* v. *Foreign & Domestic Commerce Corp.*, 337 U. S. 682, 687. Since the United States is ubiquitous (cf. *Hoiness* v. *United States*, 335 U. S. 297), petitioner contends that venue may be laid in any district court of competent jurisdiction.

The prime difficulty with this contention is that, if this be a suit against the United States, it is an unconsented suit and therefore beyond the jurisdiction of the Louisiana District Court.

Petitioner's prayer for relief is that the court grant petitioner a judgment "declaring plaintiff's rights * * * particularly that plaintiff is entitled to an order from the United States Civil Service Commission directing the defendant, L. F. Guerre, in his aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration and providing that plaintiff be restored the pay for his said position from January 2, 1947 to the date of the payment thereof * * *." (R. 15). In this Court, he has expanded this request for relief to include "a monetary judgment against the United

States" (Pet., p. 16). It would appear, therefore, that he seeks (i) an order restoring him to his job, (ii) a judgment for back pay, or (iii) a declaratory judgment that he was wrongfully discharged and is entitled to back pay and restoration. Congress has not consented to any such relief against the United States or its agencies in the district courts, and petitioner's suit, if it be against the United States or its agencies, must therefore fall as an unconsented suit against the United States. And even if Congressional permission has been given for this type of suit, it is not maintainable in that court because the Civil Service Commission cannot be reached there.

A. DISMISSALS OF FEDERAL EMPLOYEES ARE REVIEWABLE ONLY FOR DEFECTS IN THE PROCEDURE OF DISMISSAL

As a preliminary matter, we may point out that petitioner cannot obtain review in *any* court of one of the two grounds of attack he makes upon his removal. As previously noted, petitioner raises essentially two issues with respect to the validity of his removal: (1) the merits of the reasons for his discharge; (2) the legality of the procedure followed in effecting his discharge. The first issue is not justiciable. The courts have repeatedly announced that the judiciary possesses no general supervisory power over the tenure, selection, or removal of public officers and employees, that the interference of the courts with

the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief, and that the courts will not review the merits of discharges from federal employment. *Eberlein* v. *United States,* 257 U. S. 82; *Burnap* v. *United States,* 252 U. S. 512; *Brown* v. *Lane,* 232 U. S. 598; *Reagan* v. *United States,* 182 U. S. 419; *Keim* v. *United States,* 177 U. S. 290; *White v. Berry,* 171 U. S. 366; *Crenshaw* v. *United States,* 134 U. S. 99; *In re Sawyer,* 124 U. S. 200; *Matter of Hennen,* 13 Peters 230; *United States* v. *Guthrie,* 17 How. 284.[2] As the cases just cited reveal, that conclu-

[2] See also, to the same effect, *Carter* v. *Forrestal,* 175 F. 2d 364 (C. A. D. C.); *Levy* v. *Woods,* 171 F. 2d 145 (C. A. D. C.); *Friedman* v. *Schwellenbach,* 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838, rehearing denied, 331 U. S. 865; *Siskind* v. *Morgenthau,* 152 F. 2d 286 (C. A. D. C.); *Maghan* v. *Board of Commissioners of the District of Columbia,* 141 F. 2d 274 (C. A. D. C.); *Hammond* v. *Hull,* 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U. S. 777; *Levine* v. *Farley,* 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622; *United States ex rel. Palmer* v. *Lamp,* 244 Fed. 377 (C. A. 6); *United States ex rel. Anderson* v. *Sinton,* 269 Fed. 715 (C. A. D. C.); *United States ex rel. Nalle* v. *Hoover,* 31 App. D. C. 311; *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Page* v. *Moffett,* 85 Fed. 38 (C. C. D. N. J); *Morgan* v. *Nunn,* 84 Fed. 551 (C. C. M. D. Tenn.); *Flemming* v. *Stahl,* 83 Fed. 940 (C. C. W. D. Ark.); *Carr* v. *Gordon,* 82 Fed. 373 (C. C. N. D. Ill.); *Asher* v. *Forrestal,* 71 F. Supp. 470 (D. D. C.); *Waterman* v. *Somervell,* 34 F. Supp. 695 (S. D. N. Y.), certiorari denied, 317 U. S. 630, rehearing denied, 317 U. S. 710, 318 U. S. 798, 320 U. S. 214; *Block* v. *Sassaman,* 26 F. Supp. 105 (D. Minn.); *Love* v. *United States,* 98 F. Supp. 770 (C. Cls.), certiorari denied,

sion has been reached both where suit was brought in the Court of Claims against the United States *eo nomine* and where suit was brought in the district courts against the public official whose action was challenged.

The courts have intervened, however, to provide judicial relief where the discharge was contested on the ground that compliance was not had with the procedural steps prescribed by statute or regulation. In such circumstances, money judgments have been entered against the United States by the Court of Claims, and appropriate relief has been afforded the complainant against the offending public official by the District Court for the District of Columbia. *E. g., United States* v. *Wickersham,* 201 U. S. 390; *United States* v. *Elchibegoff,* 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694; *Wittner* v. *United States,* 110 C. Cls. 231; *Borak* v. *Biddle,* 141 F. 2d 278 (C. A. D. C.), certiorari denied, 323 U. S. 738; *Deak* v. *Pace,* 185 F. 2d 997 (C. A. D. C.); see also *Levine* v. *Farley,* 107 F. 2d 186, 190, and cases there cited (C. A. D. C.), certiorari denied, 308 U. S. 622. The authority of

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342 U. S. 866; *Gadsden* v. *United States,* 111 C. Cls. 487; *Weinstein* v. *United States,* 109 C. Cls. 579; *Culligan* v. *United States,* 107 C. Cls. 222, certiorari denied, 330 U. S. 848; *Kent* v. *United States,* 105 C. Cls. 280; *Bratton* v. *United States,* 90 C. Cls. 604; *Bennett* v. *United States,* 89 C. Cls. 322; *Golding* v. *United States,* 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Kellom* v. *United States,* 55 C. Cls. 174; *Lellmann* v. *United States,* 37 C. Cls. 128.

the District of Columbia court rests on its special powers and its location at the seat of the Government. *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524. See *infra*, pp. 60 *et seq.*)

B. UNDER 28 U. S. C. 1346 (d) (2), THE DISTRICT COURT HAS NO JURISDICTION OVER A SUIT FOR BACK PAY

Insofar as petitioner seeks a money judgment against the United States on the ground of a procedural defect in his removal, the Court of Claims undoubtedly has jurisdiction to grant that relief (*supra*, p. 20).[3] But a discharged employee cannot sue the United States for back pay in the district courts, even though he bases his claim on the ground that the proper procedure was not followed in discharging him. 28 U. S. C. 1346 (d) (2), as amended on October 31, 1951, expressly provides that (P. L. 248, 82d Cong., 1st Sess.): "The district courts shall not have jurisdiction under this section of: * * * (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States."

At the time this action was instituted, Section 1346 (d) (2) read as follows: "The district courts

[3] It should be noted, however, that the Court of Claims does not have the power to grant a declaratory judgment. See *Twin Cities Properties* v. *United States*, 81 C. Cls. 655.

shall not have jurisdiction under this section of: * * * (2) Any civil action to recover fees, salary, or compensation for official services of *officers* of the United States." [Emphasis added.] As shown in the Brief for the United States in *Bruner* v. *United States*, No. 391, this Term, pp. 20–34, the term "officer" was not employed in the sense of a "constitutional officer" but was generally descriptive of all regular employees of the United States, and, in any case, all civil service employees appointed by authority of the head of the department are inferior officers in the constitutional sense. Moreover, as the Brief for the United States in the *Bruner* case demonstrates (pp. 8–18), the amendment of Section 1346 (d) (2) by P. L. 248 would have the effect of ousting the district courts of any jurisdiction they might have had in pending cases, assuming that the original form of Section 1346 (d) (2) related only to constitutional officers, and that petitioner was not an inferior constitutional officer.[4]

[4] Although we think it irrelevant, for these reasons, whether petitioner occupied the position of an "officer" or "employee," it should be noted that petitioner errs in stating that the complaint alleges that he was an "employee" and that the respondents admitted this fact in its answer (Supp. Br., p. 4). Petitioner cites in support of this assertion paragraphs 1 and 5 of the complaint, which appear at pages 6 and 7 of the record. Paragraph 1 alleges, with respect to petitioner's position, only that he "had completed a probationary or trial period employed in the Civil Service in the Veterans Administration, Regional Office, No. 3021, P & S Classification No. 4 at a basic salary of $5,152.80 per annum." And paragraph 5 refers only to "his suspension without pay from his said position with the Veterans Administration on January 2, 1947 * * *."

And since the Declaratory Judgment Act (28 U. S. C. 2201–2202) is procedural only and does not enlarge the jurisdiction of the district courts, the district court below plainly lacks jurisdiction to enter a declaratory judgment that petitioner is entitled to the pay he has lost by reason of his separation from federal employment. *Di Benedetto* v. *Morgenthau*, 148 F. 2d 223 (C. A. D. C.), certiorari denied, 326 U. S. 686; *Almour* v. *Pace*, Pike & Fischer Ad. Law (2d), p. 700 (C. A. D. C.); cf. *Lynn* v. *United States*, 110 F. 2d 586 (C. A. 5); *Love* v. *United States*, 108 F. 2d 43 (C. A. 8), certiorari denied, 309 U. S. 673; *Yeskel* v. *United States*, 31 F. Supp. 956 (D. N. J.); see also *Larson* v. *Foreign & Domestic Commerce Corp.*, 337 U. S. 682, 689, fn. 9. (For a further discussion of the declaratory judgment aspects of this case, see *infra* pp. 57 *et seq.*).[*]

C. THE DISTRICT COURT HAS NO JURISDICTION TO ORDER PETITIONER RESTORED TO HIS JOB OR TO DECLARE HIM ENTITLED TO RESTORATION

Nor has Congress authorized the courts to grant specific non-monetary relief against the

[*] If this suit purports to be a suit against the United States under the Tucker Act (Act of March 3, 1887, 24 Stat. 505, 28 U. S. C. 1346), it should also be observed that it cannot lie for the additional reason that the United States has been improperly joined as a party defendant with the Civil Service Commission and respondent Guerre. *United States* v. *Sherwood*, 312 U. S. 584; *Love* v. *Royall*, 179 F. 2d 5 (C. A. 8); *Lynn* v. *United States*, 110 F. 2d 586 (C. A. 5); *New Amsterdam Cas. Co.* v. *United States*, 71 F. Supp. 155 (W. D. Pa.).

United States or its agencies as such, by way of ordering restoration to the job. The suits brought against public officials in the District Court for the District of Columbia (referred to above, pp. 20–21) were based on the theory that the defendant officer had acted in excess of his statutory authority in effecting the complainant's removal without following the prescribed procedure, and that the actions were, therefore, *not* unconsented suits against the United States. See *Larson* v. *Foreign & Domestic Commerce Corp.*, 337 U. S. 682, at 689–690. These decisions are proof, in themselves, that the United States and its non-suable agencies cannot be sued for restoratory relief. *Hunter* v. *United States*, 183 F. 2d 446 (C. A. 4), expressly so holds. Cf. *Marshall* v. *Crotty*, 185 F. 2d 622, 628, fn. 3 (C. A. 1).

Congress, which has limited Tucker and Tort Claims Act suits to claims for money only, has made no exception in employment cases and has passed no statute permitting a suit for restoration to be brought against United States, or the employing agency, or the Civil Service Commission, as agencies of the United States. The Veterans Preference Act of 1944 and the Lloyd-Lafollette Act of 1912* certainly do not contain

* Petitioner apparently suggests that the amendment of Section 6 of the Lloyd-LaFollette Act (Act of August 24, 1912, 37 Stat. 555) by the Act of June 10, 1948, 62 Stat. 354, 5 U. S. C. 652 (b) (2), expresses Congressional consent to such suits (Pet. p. 14). This assertion is entirely without merit. Section 6 (b) (2) of the Lloyd-LaFollette Act as

even a suggestion of consent-to-suit,[7] and the Declaratory Judgment Act has been authoritatively held not to have repealed, modified, or enlarged the jurisdiction of the federal courts (see *supra*, p. 23, *infra*, pp. 57–59, 64–69).

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amended (5 U. S. C. 652 (b) (2)) reveals on its face that it is not concerned with suits by civil service employees to obtain reinstatement. It provides only that an employee who has been restored or reinstated to duty after appropriate *administrative* action shall be reimbursed the pay he has lost by reason of his unjustified discharge, suspension, or furlough. The plain language of the amendment is fully supported by the pertinent Congressional documents which show that the amendment was intended to change the existing law which prevented the Government's accounting officers from paying a reinstated employee the compensation he had lost. See H. Rept. Nos. 1436, 2011, 80th Cong., 2d Sess.; S. Rept. No. 414, 80th Cong., 1st Sess. In any event the amendment is no more than a waiver of consent to be sued for a money judgment and not for reinstatement. As pointed out above (pp. 21–23), such a suit would lie only in the Court of Claims.

[7] Where Congress has conferred jurisdiction upon the district courts to entertain suits against the Civil Service Commission, as an entity and agency of the United States, it has done so expressly. See Sec. 12 (c) of the Hatch Act of August 2, 1939, 53 Stat. 1147, as amended, 54 Stat. 767, 5 U. S. C. (Supp. IV) 118 k (c); cf. *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127. Parenthetically, it may be noted that Section 12 (c) of the Hatch Act specifically deals with the problem of venue, providing that "any party aggrieved by any determination or order of the Commission under subsection (b) may * * * institute proceedings for the review thereof by filing a written petition in the district court of the United States for the district in which such officer or employee resides * * *." In this connection, it should also be pointed out that the holding in *Seven Oaks, Inc.* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4) upon which petitioner relies (Pet. pp. 11–13), that the Federal Housing Administration may be sued in any court of

THE ADMINISTRATIVE PROCEDURE ACT. In arguing that the United States has consented to suit, petitioner places primary emphasis on the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*), urging that Section 10 thereof (5 U. S. C. 1009) is a "sweeping waiver of governmental immunity." (Pet., p. 15). Until now, this contention appears to have been expressly passed upon only by the Court of Appeals for the District of Columbia Circuit and has been summarily rejected by that court as wanting in substance. *Almour* v. *Pace,* Pike & Fischer Ad. Law (2d), p. 700 (C. A. D. C.); *Aktiebolaget Bofors* v. *United States,* Pike & Fischer Ad. Law (2d), p. 698 (C. A. D. C.). That conclusion is clearly correct. The construction advanced by petitioner perverts both the language of the Act and its legislative history.[8]

The statutory language. Whatever may be the scope of judicial review under Section 10 once agency action is subjected to judicial scrutiny (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474; *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504), there is

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competent jurisdiction, is based on a specific provision in the National Housing Act, 49 Stat. 722, 12 U. S. C. 1702, which declares that the Federal Housing Administrator may "sue and be sued in any court of competent jurisdiction, State or Federal."

[8] The general legislative history of the Act is collected in S. Doc. 248, 79th Cong., 2d Sess. For convenience, that document will hereafter be referred to as S. Doc. 248.

nothing in that section which indicates that Congress dropped the pre-existing barriers to suits against the United States or its agencies, so as to grant a wholesale consent to suit and review at the instance of any person aggrieved by agency action. On the contrary, by the section's introductory clause Congress dovetailed judicial review under Section 10 to the manifold operations of the many agencies performing diverse functions under varying statutes. This opening clause, which governs the whole of the section, provides:—"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." Significantly, these exceptions are applicable not only where some other statute or rule of law forbids judicial review altogether or makes agency discretion absolute, but also "so far as"—the extent to which—Congress or substantive rules of law forbid review. It is also significant that Section 10 does not require that the statutory preclusion of judicial review be express; the word "express", as contained in an earlier draft of the bill, was eliminated by the Senate Committee. Compare S. 7, 79th Cong., 1st Sess., as introduced in January 1945, with the bill as reported in S. Rep. No. 752, 79th Cong., Sen. Doc. 248, p. 36; see also Sen. Doc. 248, pp. 229–230, 413.[9]

[9] *Ludecke* v. *Watkins*, 335 U. S. 160, 163–4, is an example of a statute precluding judicial review, though not in express terms. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113.

The bearing of the introductory clause on the instant case is this: As we have shown above (pp. 18–21), a Federal civil service employee alleging unlawful removal from employment is entitled to judicial review only on the question whether the applicable procedures were followed. To that extent, the statutes do not preclude judicial review and removal action is not committed to agency discretion. Conversely, all other questions, including the merits of the dismissal, are committed to agency discretion and judicial review is precluded. In short, the introductory clause of Section 10 continues to limit judicial review in this area to the question of whether the proper procedure was followed. See *Attorney General's Manual on the Administrative Procedure Act* (1945), p. 95. If Congress can be said at all to have consented to suit in the Administrative Procedure Act, it is only as to suits raising such procedural issues—a "traditional form of action" (see *infra*, p. 35)—which could already be maintained, prior to the Act, against the United States in the Court of Claims or against the individual officer in the District Court for the District of Columbia. Cf. *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 80–82.[10]

[10] Section 1 (a) of the Act defines "agency" as "each authority" of the Government of the United States other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia (5 U. S. C.

Can it be said, however, that Section 10 somehow consents to suit in a district court other than the District of Columbia court, so as to enlarge the jurisdiction of all other federal district courts? Nothing in the section speaks in such terms of granting or modifying existing jurisdiction or of consent-to-suit. Indeed, the section assumes on its face that jurisdiction is granted by other legislation. Section 10 (b) declares that, in the absence or inadequacy of a special statutory review proceeding, review of reviewable agency action may be had by "any applicable form of legal action * * * *in any court of competent jurisdiction*" (emphasis supplied). This reference to a "court of competent jurisdiction" can mean only a court deriving its jurisdiction from some other statute and otherwise competent. Cf. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 622, 627. Neither subsection (b) nor any other part of Section 10 purports to confer any new jurisdiction on the district courts."[11] Moreover, the introductory phrase—"except so far as (1) statutes preclude judicial review"—modifies subsection (b), as well as the rest of Section 10, and would continue to bar suit in district courts outside the District of Columbia

(Supp. IV) 1001 (a)). The word "authority" is used as meaning officers, boards or commissions. See S. Doc. No. 248, pp. 196, 253, 354.

[11] On the non-effect of Section 10 (b) on *venue* of suits against officials, see *infra*, pp. 44–47.

since the jurisdictional provisions of Title 28 of the Code preclude judicial review in those courts.[12] *Supra*, pp. 18–25; *infra*, pp. 57–68. Certainly, the least that can be said is that one cannot spell out of Section 10 the express conferring of consent to sue the United States or its agencies which has always been required: Cf. *United States* v. *Shaw*, 309 U. S. 495, 500–1. *United States* v. *Sherwood*, 312 U. S. 584, 590; *United States* v. *Michel*, 282 U. S. 656, 659.

Since the passage of the Administrative Procedure Act in June 1946, Congress has not acted as if that statute had constituted "a sweeping waiver", as petitioner urges. If this had been so, it would hardly have been necessary to spell out in detail only two years later, in the revision of the Judicial Code in 1948, the limited class of cases in which the United States *eo nomine* might be sued in the district courts. See 28 U. S. C. 1346. Nor is the concept of "a sweeping waiver" of immunity consonant with the express limitations provided in Section 1346 upon the jurisdiction of those courts. Thus, in civil actions not sounding in tort or arising under the internal-revenue laws,

[12] That Section 10 was not intended to amend the substantive law with regard to sovereign immunity is further substantiated by subsection (c) which states, subject to the introductory proviso quoted above, that "every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." As pointed out *supra*, pp. 20–21, a discharged federal employee does have an adequate remedy in the Court of Claims and the District Court for the District of Columbia.

the claim asserted may not exceed $10,000 (28 U. S. C. 1346 (a) (2)). Further, the district courts are denied jurisdiction under that section of "(1) Any civil action or claim for a pension; (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States." (28 U. S. C. 1346 (d) (1) and (2), as amended by P. L. No. 248, October 31, 1951). Since Section 1346 is merely a consolidation of provisions existing at the time of the passage of the Administrative Procedure Act (see Reviser's Note following 28 U. S. C. 1346), it is a necessary inference from their reenactment in 1948 that Congress did not believe that the Administrative Procedure Act had amended the substantive law respecting sovereign immunity so as to confer general consent to sue throughout the country. And it is most unlikely that Congress would recently have made it unmistakably clear that all federal salary suits, including actions by dismissed employees, must be brought in the Court of Claims (see *supra*, pp. 21–22), if it had been of the view that suits for job restoration could be brought in the various district courts.

The legislative history. The legislative history of Section 10 confirms (a) that full effect should be given to the introductory clause, and (b) that Congress was not concerned with conferring con-

sent-to-suit or enlarging the jurisdiction of the district courts.

The history of this section of the Act has been set forth in some detail in the Government's briefs in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, No. 42, October Term, 1950, pp. 59–68, and *McGrath* v. *Kristensen*, No. 34, October Term, 1950, pp. 41–48, 50–52, and is summarized by the Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 478–487; cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36–41. In this brief, we shall merely recapitulate for the Court's convenience the stress that was laid, by practically all participants, on not disturbing existing rules "for or against judicial review", and on the absence of any consideration of the jurisdictional problems flowing from sovereign immunity.

The influential minority of the Attorney General's Committee on Administrative Procedure drafted as part of their recommendations a section on judicial review which is the ancestor of Section 10 of the Administrative Procedure Act. *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 245–246. However, the minority of the Committee made it clear that "The situation should be clarified by a statement of legislative policy in no uncertain terms, but at the same time it is unnecessary to go beyond certain simple and recognized prin-

ciples which have long obtained. The several provisions of this section are designed merely to state a policy * * * without disturbing existing express statutory provisions for or against judicial review." *Report*, p. 245. And they emphasized their position by providing in their proposed section on judicial review that "all statutory provisions specifically precluding judicial review * * * shall remain valid and binding." *Report*, p. 246.

The minority views as to judicial review, which are largely embodied in Section 10 of the Act, were at all times described by their proponents as a statement of general principles which was not intended to provide a rigid procedure for judicial review applicable to all agencies.[13]

In the 1945 hearings before the House Judiciary Committee, the aims of the proponents of this measure were described even more specifically by Mr. Carl McFarland, then Chairman of the American Bar Association's Special Committee on Administrative Law (S. Doc. No. 248, pp. 83–84):[14]

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[13] The majority and minority members also made similar statements in testifying before the Senate Judiciary Committee in 1941. See *Hearings Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 77th Cong., 1st Sess., on S. 674, S. 675, and S. 918* (1941), at pp. 838, 845, 849, 850, 1350–1359, and 1400.

[14] Mr. McFarland was one of the minority group on the Attorney General's Committee.

> We think there must be a section on judicial review within the statute; we think it will be very helpful; we think it will simplify the subject to the extent of indicating to the lawyer or businessman or farmer or laborer who may be involved that his rights of review are of such and such a kind; *but we do not believe the principle of review or the extent of review can or should be greatly altered.* We think that the *basic exception of administrative discretion should be preserved—must be preserved.* We believe that about all the statute should or could do would be to state the form of action, *the type of acts that are reviewable in accordance with the present law,* the authority of the courts to grant temporary relief so that review may be useful, but that the scope of review should be as it now is. [Emphasis supplied.]

With reference to the introductory proviso of Section 10, the Report on the bill by the Senate Committee on the Judiciary (S. Rep. 752, 79th Cong., 1st Sess.) comments that "The basic exception of matters committed to agency discretion would apply even if not stated at the outset." S. Doc. No. 248, p. 212. Similarly, the House Committee on the Judiciary pointed out in its Report, with respect to Section 10 (H. Rept. No. 1980, 79th Cong., 2d Sess.) that "Matters of discretion are necessarily exempted from the section * * * Where laws

are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers." S. Doc. No. 248, p. 275.

Comparable expressions by the chief legislative supporters of the legislation buttress the conviction that Section 10 of the Adminfstrative Procedure Act was not intended to extend the occasions for judicial review or to widen the jurisdiction of the federal courts to hear cases against the Government. Thus, Representative Walter, chairman of the subcommittee of the House Committee on the Judiciary which sponsored this legislation, made the following statement on the floor of the House on May 24, 1946, shortly before the bill's enactment (S. Doc. 248, p. 369):

> These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. *It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress had made no contrary provisions for judicial review.* [Emphasis supplied.]

And most pertinently, Senator McCarran, Chairman of the Senate Judiciary Committee, stated (S. Doc. 248, p. 311):

> Substantive law, enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress.[15]

The Attorney General previously had made similar explicit statements to the effect that Section 10 of the Act did not go beyond existing law subjecting governmental action to review, in letters to the Chairman of the Senate[16] and

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[15] The Senate Judiciary Committee's Print of June 1945, likewise indicated that Section 10 of the Administrative Procedure Act was not designed to supplant existing modes of judicial review, and that "the recognition of these so-called common-law types of review is in accord with the authoritative statement of existing law." S. Doc. 248, p. 37.

[16] "This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297); *American Federation of Labor* v. *National Labor Relations Board* (308 U. S. 401); *Butte, Anaconda and Pacific Railway Co.* v. *United States* (290 U. S. 127). Many matters are committed partly or wholly to agency discretion. Thus, the courts have held that the refusal by the National Labor Relations Board to issue a complaint is an exercise of discretion unreviewable by the courts (*Jacobsen* v. *National Labor Relations Board*, 120 F. (2d) 96 (C. C. A. 3d); *Marine Engineers' Beneficial Assn.* v. *National Labor Relations Board*, decided April 8, 1943 (C. C. A. 2d), certiorari denied, 320 U. S. 777). In this act, for example, the failure to grant a petition filed under section 4 (d) would be similarly unreviewable." S. Doc. No. 248, pp. 229-230.

House [17] Judiciary Committees, furnished at their request. The Attorney General's letter and comprehensive analysis were appended to and made part of the final report on this bill by the Senate Judiciary Committee.[18]

This history certainly underscores the Congressional purpose, reflected on the face of the Act, not to add to "the type of acts that are reviewable in accordance with the present law". And unlike the question of the scope of review, the history shows that there was little or no Congressional concern over agency action which was reviewable only in a designated forum; there was certainly no trend toward enlarging the number of courts in which review might be had. On the contrary, Congress made it quite clear that existing venue provisions were not altered. See *infra*, pp. 44–47. A legislative background of this type does not permit of even a shadowy inference that the jurisdiction of all the district courts was *sub silentio* broadened to include consented suits against the United States, or its agencies, for job restoration.

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[17] "It [the proposed legislation] also restates the law governing judicial review of administrative action." S. Doc. 248, p. 407. See also pp. 413, 415.

[18] S. Doc. 248, p. 223, et seq. In another connection, this Court found that such use of a letter from the Attorney General served, "in the absence of contradiction by the report, as an indication of the Committee's opinion on the intended effect" of the legislation. *American Stevedores* v. *Porello*, 330 U. S. 446, 452.

D. EVEN IF CONGRESS HAS GIVEN CONSENT TO THE MAINTENANCE IN THE DISTRICT COURTS OF SUITS FOR JOB RESTORATION BROUGHT AGAINST FEDERAL AGENCIES AS SUCH, PETITIONER'S SUIT MUST FAIL BECAUSE THE CIVIL SERVICE COMMISSION IS AN INDISPENSABLE PARTY WHICH CANNOT BE SUED IN THE EASTERN DISTRICT OF LOUISIANA

Petitioner cannot prevail even if the Court should be convinced that the Administrative Procedure Act (or some other statute) has given the district courts general jurisdiction over job restoration suits brought against federal agencies, rather than merely confirming the existing traditional form of action against individual officers (in the District of Columbia) for actions in excess of authority. For the Civil Service Commission is an indispensable party and it cannot be sued in the Louisiana District Court. It cannot be reached there because the venue is improper, and because personal jurisdiction was not obtained over it.

1. *The Commission is an indispensable party.*— It would appear from petitioner's compiaint and the arguments advanced by him that petitioner considers the Commission to be an indispensable party.[19] To begin with, the Commission was named a party defendant and service of process was at-

[19] Thus, petitioner argues only "in the alternative" that the Commission is not an indispensable party because the District Court "could surely have rendered judgment against the United States Government for the monetary amount determined to be due him without the Civil Service Commission being a party to the action." (Pet. p. 17). But as we have already shown (pp. 21–23), the District Court has no jurisdiction to enter a money judgment in favor of an officer or employee of the United States for fees, salary, or compensation.

tempted to be made on the Commission (*supra*, p. 5). Second, the substance of petitioner's complaint is that the Commission reversed the findings of its Regional Board and approved the action of the Veterans Administration removing him from his position. Finally, petitioner's primary prayer for relief is that he "is entitled to an order from the United States Civil Service Commission directing the defendant, L. F. Guerre, in his aforesaid capacity, to restore plaintiff to his aforesaid position with the Veterans Administration." (R. 15).

The purpose of this suit, therefore, is to control the action of the Commission. Petitioner challenges that action and seeks relief against it because the decision of the Commission reversing the decision of its Regional Board and affirming the action of the Veterans Administration is binding upon the Veterans Administration. Section 14 of the Veterans Preference Act of 1944, upon which petitioner bases his claim of an unlawful discharge, expressly provides that (5 U. S. C. (Supp. IV) 863) "it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends." Cf. Sec. 19 of the Veterans Preference Act of 1944, 5 U. S. C. (Supp. IV) 868; see also 5 CFR 1949 ed. 22.11 (f).

In the circumstances, this Court's pronouncements in *Warner Valley Stock Co.* v. *Smith*, 165

U. S. 28; *Gnerich* v. *Rutter*, 265 U. S. 388; and *Webster* v. *Fall*, 266 U. S. 507, compel the conclusion that the Commission is an indispensable party. As the Court pointed out in *Williams* v. *Fanning*, 332 U. S. 490, 493, "these cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." Unlike the relief sought in *Williams* v. *Fanning*, *supra*, which would not require the Postmaster General "to take *new* action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case" [emphasis added] (*id.* at 494), the relief sought here would require new action by the Commission directly. We submit, therefore, that the Commission is an indispensable party to this suit, even if it be assumed that some consent to suit has been granted by Congress in job restoration cases. The courts have so held in comparable cases in which the relief prayed for required action by a superior officer. *Money* v. *Wallin*, 186 F. 2d 411 (C. A. 3), certiorari denied, 341 U. S. 935; *Daggs* v. *Klein*, 169 F. 2d 174 (C. A. 9), certiorari denied, 335 U. S. 908; *McGrimley* v. *Foley*, 89 F. Supp. 10 (D. Mass.), affirmed, 180 F. 2d 1022 (C. A. 1); cf. *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3); *Berlinsky* v. *Woods*, 178 F. 2d 265 (C. A. 4),

certiorari denied, 339 U. S. 949; *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 (C. A. 4); *Clement Martin, Inc.* v. *Dick Corp.*, 97 F. Supp. 961 (W. D. Pa.); *Kohlman* v. *Smith*, 71 F. Supp. 73 (W. D. Pa.).

2. *The Eastern District of Louisiana is an improper venue for the Commission.*—Since 28 U. S. C. 1391 (b) provides that an action such as is here involved "may be brought only in the judicial district where all defendants reside," it follows that venue was improperly laid in the District Court for the Eastern District of Louisiana if the official situs of the Commission is not in that district. That it is not there located would not seem to be open to question. Although the statute providing for the creation of the Commission does not fix its situs, is is common knowledge that the central office of the Commission is in Washington, D. C. See Congressional Directory, 82d Cong., 1st Sess., p. 448; United States Government Organization Manual 1951–1952, p. 472; Sections 22.11, 23.16 of the Rules of the Commission, 5 CFR 1949 ed. 22.11, 23.16. We believe the Court can take judicial notice, as did the court below (R. 38), "that the Commission's official situs and legal domicile is in the District of Columbia, where its plenary powers are exercised, though many of its subordinate and ministerial functions are necessarily carried out locally by regional officials who act, not by virtue

of their own authority, but solely under the control and direction of the Commission."*

In comparable suits against Government officials, the courts have uniformly announced that the official residence of the heads of the executive departments and agencies, and of the agencies themselves, is in the District of Columbia. *Butterworth* v. *Hill*, 114 U. S. 128 (Comm'r of Pat-

* Petitioner urges that the Commission does reside in New Orleans because it has a substantial staff there which performs numerous specific duties delegated to them by the Commission. Petitioner asserts that the Regional Director of the New Orleans office is also "in practice the general manager of the Commission in this district * * * [and, therefore,] that the Regional Director is included within the term 'Civil Service Commission' as expressly defined by Sec. 17 of the Veterans Preference Act, 5 U. S. C. A. 866." Petitioner concludes, therefore, that the Commission is present and functioning in that jurisdiction and that the service upon the Regional Director in New Orleans was effective service upon the Commission. (Pet. pp. 7–8). This argument is specious. The fact that some of the subordinate and ministerial functions of the Commission are necessarily carried out locally by regional officials and employees who act solely under the control and direction of the Commission patently does not change the official situs of the Commission for the purposes of venue.

Petitioner's further argument that such officials and employees are the Commission within the meaning of Section 17 of the Veterans Preference Act completely distorts the meaning and intent of that section, which, on its face, merely provides for succession in office by reason of subsequent legislation or reorganization on the part of the President. It is manifest from Section 1 of the Act of January 16, 1883, 22 Stat. 403, as amended, 5 U. S. C. 632, that there are but three Civil Service Commissioners and that the "said three Commissioners shall constitute the United States Civil Service Commission." See also 1949 Reorganization Plan No. 5, 14 F. R. 5227, 63 Stat. 1067.

ents); *Hunter* v. *United States*, 183 F. 2d 446 (C. A. 4) (Postmaster General); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3) (Comm'r of Immigration & Naturalization); *Berlinsky* v. *Woods*, 178 F. 2d 265 (C. A. 4); certiorari denied, 339 U. S. 949 (Housing Expediter); *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2) (Comm'r of Immigration & Naturalization); *United States Department of Agriculture* v. *Hunter*, 171 F. 2d 793 (C. A. 5) (Sec'y. of Agriculture); *Daggs* v. *Klein*, 169 F. 2d 174 (C. A. 9), certiorari denied, 335 U. S. 908 (Sec'y. of Navy).[21]

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[21] To the same effect see *Clement Martin, Inc.* v. *Dick Corp.*, 97 F. Supp. 961 (W. D. Pa.) (U. S. Surgeon General); *Stamatiou* v. *Miller*, 88 F. Supp. 556 (E. D. Pa.) (Comm'r of Immigration & Naturalization); *Isthmian S. S. Co.* v. *LeBaron*, 72 F. Supp. 223 (S. D. N. Y.) (National Labor Relations Board); *Mission Beverage Co.* v. *Porter*, 72 F. Supp. 568 (N. D. N. Y.) (Price Administrator); *Olin Industries* v. *National Labor Relations Board*, 72 F. Supp. 225 (D. Mass.) (NLRB); *Olson* v. *Porter*, 68 F. Supp. 240 (E. D. Wis.) (Price Administrator); *Wisconsin Restaurant Ass'n* v. *Porter*, 68 F. Supp. 239 (E. D. Wis.) (Price Administrator); *Tribal Council of Blackfeet Indian Reservation, Mont.* v. *Ickes*, 58 F. Supp. 584 (D. Mont.) (Sec'y. of Interior); *Hartmann* v. *Federal Reserve Bank*, 55 F. Supp. 801 (E. D. Pa.) (Sec'y. of Treasury); *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M. D. Pa.) (Postmaster General); *Ernest* v. *Fleissner*, 38 F. Supp. 326 (E. D. Wis.) (Postmaster General); *Smith* v. *Farley*, 38 F. Supp. 1012 (S. D. N. Y.). (Postmaster General); *Juell* v. *Commissioner of Immigration and Naturalization*, 37 F. Supp. 533 (E. D. N. Y.), modified on other ground 121 F. 2d 728 (C. A. 2) (Comm'r of Immigration & Naturalization); *Canon* v. *Robertson*, 32 F. 2d 295 (D. Md.), modified on other grounds 45 F. 2d 51 (C. A. 4) (Comm'r of Patents); *Kentucky Nat-*

Since this action must be brought "in the judicial district where all defendants reside" (28 U. S. C. 1391 (b)), venue can properly be laid only in the District Court for the District of Columbia where the Commission resides, and the courts have so held in similar cases. Cf. *Butterworth* v. *Hill, supra; Podvinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3); *Putnam* v. *Ickes*, 78 F. 2d 223 (C. A. D. C.), certiorari denied, 296 U. S. 612; *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451 (C. A. 4).[22]

Petitioner contends, however, that 28 U. S. C. 1391 (b) is inapplicable here because of Section

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ural Gas Corp. v. *Public Service Commission of Kentucky*, 28 F. Supp. 509 (E. D. Ky.), affirmed, 119 F. 2d 417 (C. A. 6) (Federal Power Commission); *International Molders Union of North America* v. *National Labor Relations Board*, 26 F. Supp. 423 (E. D. Pa.) (NLRB); *Nesbitt Fruit Products Inc.* v. *Wallace*, 17 F. Supp. 141 (S. D. Iowa) (Sec'y. of Agriculture); *Klein* v. *Hines*, 1 F. R. D. 649 (N. D. Ill.) (Veterans' Administrator).

[22] To the same effect see *Clement Martin, Inc.* v. *Dick Corp.*, 97 F. Supp. 961 (W. D. Pa.); *Stamatiou* v. *Miller*, 88 F. Supp. 556 (E. D. Pa.); *Isthmian S. S. Co.* v. *LeBaron*, 72 F. Supp. 223 (S. D. N. Y.); *Mission Beverage Co.* v. *Porter*, 72 F. Supp. 568 (N. D. N. Y.); *Wisconsin Restaurant Ass'n* v. *Porter*, 68 F. Supp. 239 (E. D. Wis.); *Olson* v. *Porter*, 68 F. Supp. 240 (E. D. Wis.); *Smith* v. *Farley*, 38 F. Supp. 1012 (S. D. N. Y.); *Kentucky Natural Gas Corp.* v. *Public Service Commission of Kentycky*, 28 F. Supp. 509 (E. D. Ky.), affirmed, 119 F. 2d 417 (C. A. 6); *International Molders Union of North America* v. *National Labor Relations Board*, 26 F. Supp. 423 (E. D. Pa.); *Nesbitt Fruit Products Inc.* v. *Wallace*, 17 F. Supp. 141 (S. D. Iowa); *Canon* v. *Robertson*, 32 F. 2d 295 (D. Md.), modified on other grounds 45 F. 2d 51 (C. A. 4).

10 (b) of the Administrative Procedure Act (5 U. S. C. 1009 (b)), which provides that judicial review may be had "in any court of competent jurisdiction." Concededly, if that phrase be read out of context, it might be construed as an unrestricted choice of venue. Cf. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619. Placed in its proper setting, however, the phrase cannot be so read. In its entirety, Section 10 (b) states as follows:

> The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Thus, in providing for review "in any court specified by statute" or in the absence or inadequacy thereof "in any court of competent jurisdiction," Section 10 (b) does not waive venue requirements but incorporates existing law as to venue.

This reading is substantiated by the Report of House Committee on the Judiciary (H. Rept.

No. 1980, 79th Cong., 2d Sess.) which expressly declared that "The section does not alter venue provisions under existing law, whether in connection with specially provided statutory review or the so-called nonstatutory or common-law-action variety." (S. Doc. No. 248, 79th Cong., 2d Sess., p. 276). Similarly, Representative Walter stated during the course of his explanation of the bill to the House that "These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law." (S. Doc. No. 248, 79th Cong., 2d Sess., p. 369).[23] We

[23] These Congressional comments take on added significance when the language of Section 10 (b) is contrasted with that contained in other bills introduced in the 79th Congress. Sharply differing from Section 10 (b) of the Act, H. R. 339 proposed in Section 9 (c) thereof that "The review guaranteed by this section shall be had upon application to the courts named in statutes especially providing for judicial review or, in the absence or inadequacy thereof, to the district court of the United States (including the District Court of the District of Columbia) in the State, district, and division where the party seeking court review * * * resides * * *." (S. Doc. No. 248, 79th Cong., 2d Sess., p. 145). Section 9 (c) of H. R. 1117 contained substantially the same language (S. Doc. No. 248, 79th Cong., 2d Sess., p. 153). And Section 310 (c) of H. R. 1206 stated with respect to "Courts and Venue" that "Whenever a court shall hold that it is without jurisdiction to hear and determine a timely application or petition for such review on the ground that the same should have been filed before some other court, it shall transmit such pleadings and other papers, together with a statement of its reasons for doing, to such court of compe-

submit, therefore, that the phrase "in any court of competent jurisdiction" in Section 10 (b) must be construed as incorporating the provisions of 28 U. S. C. 1391 (b).[24]

3. *Jurisdiction in personam was not obtained over the Commission.*—Moreover, the Louisiana District Court does not have personal jurisdiction over the Civil Service Commission. Petitioner concedes that the issue of proper service must be determined by reference to the Federal Rules of Civil Procedure (Pet., pp. 10–11). Cf. *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2); *Eng Kam* v. *McGrath*, 10 F. R. D. 135 (W. D. Wash.). Those requirements have not been fulfilled here.

Petitioner attempted to serve the Commission in two ways: (i) by registered mail to the Commission in Washington, D. C.; and (ii) by personal service on A. J. Leach, Regional Director of the Tenth Civil Service Region in New Orleans, Louisiana (R. 2, 3). Service was not properly effectuated by either device.

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tent jurisdiction as may be designated by the applicant * * *" (S. Doc. No. 248, 79th Cong., 2d Sess., p. 176).

[24] Petitioner's reliance on *Seven Oaks, Inc.* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4), is misplaced (Pet. pp. 11–13). The language of the National Housing Act, 49 Stat. 722, 12 U. S. C. 1702, providing that the Federal Housing Administrator may "sue and be sued in any court of competent jurisdiction, State or Federal," necessarily waived venue by permitting suits in the State as well as the Federal courts. Of course, suits under that Act against the Administrator are, plainly, consented suits against the United States. Cf. *United States* v. *Allied Oil Corp.*, 341 U. S. 1, 5.

Rule 4 (d) (5) of the Federal Rules of Civil Procedure provides for service "Upon an officer or agency of the United States, by serving the United States and by *delivering* a copy of the summons and of the complaint to such officer or agency. * * *" [Emphasis added]. *Infra*, p. 79. Since the sending of a copy of the summons and of the complaint by registered mail is obviously not the "delivering" of such copies,[22] petitioner's attempt to serve the Commission clearly did not comply with Rule 4 (d) (5). Accordingly, the district court did not acquire jurisdiction *in personam* by such attempted service.

This conclusion is reinforced by Rule 4 (f) which provides that "All process other than a subpoena" may be served only "within the territorial limits of the state in which the district court is held" unless a statute of the United States otherwise provides. *Infra*,

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[22] That service by registered mail is not "delivery" is manifest from Rule 4 (d) (4) which provides for service "Upon the United States, by *delivering* a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought * * * and by *sending* a copy of the summons and of the complaint by registered mail to the Attorney General, * * * and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also *sending* a copy of the summons and of the complaint by registered mail to the Attorney General * * * and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also *sending* a copy of the summons and of the complaint by registered mail to such officer or agency." [Emphasis added.]

p. 80. Since service by mail upon the Commission in Washington, D. C., was service outside the territorial limits of Louisiana, and no statute of the United States provides for service, in cases such as the one at bar, anywhere in the United States,[26] such attempted service was invalid under Rule 4 (f) as well as under Rule 4 (d) (5). Cf. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619; *Munter* v. *Weil Corset Co.*, 261 U. S. 276; *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (C. A. 2); *Love* v. *Royalt*, 179 F. 2d 5 (C. A. 8); *Berlinsky* v. *Woods*, 178 F. 2d 265 (C. A. 4), certiorari denied, 339 U. S. 949; *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2); *Eighth Regional War Labor Board* v. *Humble Oil & Refining Co.*, 145 F. 2d 462 (C. A. 5), certiorari denied, 325 U. S. 883; *Blank* v. *Bitker*, 135 F. 2d 962 (C. A. 7); *Putnam* v. *Ickes*, 78 F. 2d 223 (C. A. D. C.), certiorari denied, 296 U. S. 612; *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451 (C. A. 4)—all holding that process cannot run outside the court's jurisdiction.

Petitioner apparently concedes that service by registered mail was improper service, stating that the question of service is "namely, whether the service effected on the Civil Service Commission

[26] If, as we have just shown (pp. 44-47), Section 10 (b) of the Administrative Procedure Act has not changed the venue provision applicable to this case (*i. e.* 28 U. S. C. 1391 (b)), it certainly did not change these requirements as to personal jurisdiction. As was said in *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 627, "It is not lightly to be assumed that Congress intended to depart from a long established policy" requiring service of process to be within the district.

through its Regional Manager in New Orleans was proper service on the Commission." (Pet. p. 10). Petitioner argues that physical delivery of the summons and complaint to A. J. Leach, the Regional Director, was substantial compliance with the requirements of Rule 4 (d) (5). (Pet. p. 11). Assuming *arguendo*, as we do in this Point I, D, that a district court could have jurisdiction over an agency of the United States in this type of suit, delivery to the Regional Director of the Commission is still not sufficient compliance with the requirements of Rule 4 (d) (5) that there be physical delivery of the summons and complaint to the "agency."[27] Service upon a subordinate official of an agency could constitute proper service only if that official were authorized specifically by appointment or by law

[27] It should be observed that an agency of the United States may be deemed to be the United States for some purposes and a separate entity for other purposes. *E. g.*, see *United States* v. *Interstate Commerce Commission*, 337 U. S. 426; compare *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U. S. 81, with *Cherry Cotton Mills, Inc.* v. *United States*, 327 U. S. 536. Further, agencies of the United States may have conflicting interests in the same law suit. See *United States ex rel. Chapman* v. *Federal Power Commission*, 191 F. 2d 796 (C. A. 4). Accordingly, it does not follow that, in a suit against the agency as an entity, the law as to venue and jurisdiction governing suits against the United States *eo nomine* is applicable. That it is not necessarily applicable is shown by the differences between Rules 4 (d) (4) and 4 (d) (5) of the Federal Rules of Civil Procedure. The former relates to service "upon the United States" and the latter to service "upon an officer or agency of the United States." *Infra*, pp. 79–80.

to accept service of process. Cf. *Olin Industries* v. *National Labor Relations Board*, 72 F. Supp. 225 (D. Mass.); *Waterman* v. *Somervell*, 34 F. Supp. 695 (S. D. N. Y.), certiorari denied, 317 U. S. 630, rehearing denied, 317 U. S. 710, 318 U. S. 798, 320 U. S. 214; *International Molders Union of North America* v. *National Labor Relations Board*, 26 F. Supp. 423 (E. D. Pa.); *Jamestown Veneer & Plywood Corp.* v. *National Labor Relations Board*, 13 F. Supp. 405 (W. D. N. Y.); *Regina Cargo Airlines, Inc.* v. *Civil Aeronautics Board*, 10 F. R. D. 628 (E. D. N. Y.); *Mission Beverage Co.* v. *Porter*, 72 F. Supp. 568 (N. D. N. Y.); *Federal Landlords Committee, Inc.* v. *Woods*, 9 F. R. D. 622 (S. D. N. Y.). In the present case, there is no such authorization and petitioner points to none.[28]

Because of these provisions in the Federal Rules of Civil Procedure and the traditional ter-

[28] Petitioner suggests, in this connection, that, under Rule 4 (d) (5) service on an agency which is a corporation may be made under Rule 4 (d) (3), which provides for service upon "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process * * *." But, clearly, the Civil Service Commission is not a corporate agency of the United States (see 5 U. S. C. 632). The case of *Seven Oaks, Inc.* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4), upon which petitioner relies (Pet., pp. 11–13), is inapposite, therefore, since the court there regarded the Federal Housing Administration as a corporation and pointed out that this Court had listed it as a federal corporation in *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 390, fn. 3. Unlike the Federal Housing Administration, the Civil Service Commission is not engaged in commercial activity. Cf. *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 245.

ritorial limitations upon the exercise of *in personam* jurisdiction, it is clear that the only court which would have jurisdiction *in personam* over the Civil Service Commission is the District Court for the District of Columbia. The courts have uniformly so held in suits against other public officials whose official residence is in the District of Columbia. *Smart* v. *Woods*, 184 F. 2d 714 (C. A. 6), certiorari denied, 340 U. S. 936; *Hunter* v. *United States*, 183 F. 2d 446 (C. A. 4); *Love* v. *Royall*, 179 F. 2d 5 (C. A. 8); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3), *Berlinsky* v. *Woods*, 178 F. 2d 265 (C. A. 4) certiorari denied, 339 U. S. 949; *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2); *United States Department of Agriculture* v. *Hunter*, 171 F. 2d 793 (C. A. 5); *Daggs* v. *Klein*, 169 F. 2d 174 (C. A. 9), certiorari denied, 335 U. S. 908; *Mecartney* v. *Hoover*, 151 F. 2d 694 (C. A. 7); *Eighth Regional War Labor Board* v. *Humble Oil & Refining Co.*, 145 F. 2d 462 (C. A. 5); *Howard* v. *United States ex rel. Alexander*, 126 F. 2d 667 (C. A. 10), certiorari denied, 316 U. S. 699, rehearing denied, 317 U. S. 705; *Jewel Productions, Inc.* v. *Morgenthau*, 100 F. 2d 396 (C. A. 2); *Abe Rafelson Co.* v. *Tugwell*, 79 F. 2d 653 (C. A. 7); *Putnam* v. *Ickes*, 78 F. 2d 223 (C. A. D. C.), certiorari denied, 296 U. S. 612; *Transcontinental & Western Air, Inc.* v.

Farley, 71 F. 2d 288 (C. A. 2), certiorari denied, 293 U. S. 603; *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451 (C. A. 4).[20]

We submit, therefore, that, not only was venue improperly laid in the district court below, but the court also lacked jurisdiction *in personam*—even on the assumption that section 10 of the Administrative Procedure Act does make a difference as to the court's jurisdiction over the subject matter, *i. e.*, a suit by a federal employee for job restoration.

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[20] To the same effect see *Juell* v. *Commissioner of Immigration and Naturalization*, 37 F. Supp. 533 (E. D. N. Y.), modified on other grounds 121 F. 2d 728 (C. A. 2); *Canon* v. *Robertson*, 32 F. 2d 295 (D. Md.), modified on other grounds 45 F. 2d 51 (C. A. 4); *Kentucky Natural Gas Corp.* v. *Public Service Commission of Kentucky*, 28 F. Supp. 509 (E. D. Ky.), affirmed, 119 F. 2d 417 (C. A. 6); *Clement Martin, Inc.* v. *Dick Corp.*, 97 F. Supp. 961 (W. D. Pa.); *Mission Beverage Co.* v. *Porter*, 72 F. Supp. 568 (N. D. N. Y.); *New Amsterdam Cas. Co.* v. *United States*, 71 F. Supp. 155 (W. D. Pa.); *Olson* v. *Porter*, 68 F. Supp. 240 (E. D. Wis.); *Tribal Council of Blackfeet Indian Reservation, Mont.* v. *Ickes*, 58 F. Supp. 584 (D. Mont.); *Totus* v. *United States*, 39 F. Supp. 7 (E. D. Wash.); *Ernest* v. *Fleissner*, 38 F. Supp. 326 (E. D. Wis.); *International Molders Union of North America* v. *National Labor Relations Board*, 26 F. Supp. 423 (E. D. Pa.); *Carr* v. *Desjardines*, 16 F. Supp. 346 (W. D. Okla.); *Jamestown Veneer & Plywood Corp.* v. *National Labor Relations Board*, 13 F. Supp. 405 (W. D. N. Y.); *Eng Kam* v. *McGrath*, 10 F. R. D. 135 (W. D. Wash.); *Regina Cargo Airlines, Inc.* v. *Civil Aeronautics Board*, 10 F. R. D. 628 (E. D. N. Y.); *Federal Landlords Committee, Inc.* v. *Woods*, 9 F. R. D. 622 (S. D. N. Y.); *Klein* v. *Hines*, 1 F. R. D. 649 (N. D. Ill.).

II

IF THIS IS A SUIT AGAINST THE RESPONDENTS AS INDIVIDUAL OFFICERS, IT LIKEWISE CANNOT BE MAINTAINED IN THE DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

The second string to petitioner's bow appears to be that, entirely aside from the Administrative Procedure Act, he is entitled to proceed in the Louisiana District Court against the respondents as individual officers acting in excess of their statutory authority, just as he could proceed in the District of Columbia. This argument, too, is clearly unmeritorious. The suit cannot be maintained in the Louisiana District Court because (A) the Civil Service Commissioners who are indispensable parties cannot be sued in that venue and the court does not have, and cannot obtain, personal jurisdiction over them, and (B) in any event, the Louisiana court cannot grant the only relief requested against the individual respondents, *i. e.*, a declaration that he is entitled to restoration or an actual order of restoration.

A. THE CIVIL SERVICE COMMISSIONERS WHO ARE INDISPENSABLE PARTIES CANNOT BE SUED IN THE DISTRICT COURT

Our argument on this point is substantially the same as we have made in Point I, *supra*, pp. 38–53.

1. *Indispensable parties.*—For the same reasons discussed above on the assumption that the action was brought against the Commission as a

Government agency, the Civil Service Commissioners are indispensable parties on the assumption that the suit runs against them as individual officers. *Supra*, pp. 38–41. The restoratory relief sought would require the Commissioners to direct respondent Guerre to restore petitioner to his prior position (R. 15), and petitioner could not be so restored without action by the Commissioners. Their concurrence is necessary. Under *Williams* v. *Fanning*, 332 U. S. 490, 493, 494, and earlier cases, they are indispensable parties.

2. *Venue.*—As shown above (pp. 41–44), 28 U. S. C. 1391 (b)—which prescribes that "A civil action wherein jurisdiction is not founded solely on diversity of citizenship" may "be brought only in the judicial district where all defendants reside, except as otherwise provided by law"—requires that an action against the Commissioners be brought in the District of Columbia. This is the official residence of the Commissioners as well as of the Commission as an agency. *Supra*, pp. 42–44.

3. *Jurisdiction in personam.*—Personal service was not and could not be made on the Commissioners. All that petitioner did was to send the summons and complaint by registered mail to Washington, and serve a copy on the Regional Director of the Tenth Civil Service Region in New Orleans (R. 2, 3). For the reasons and on the authorities given above (pp. 47–53), this is not sufficient under the Federal Rules of Civil Pro-

cedure. If the applicable provision is Rule 4 (d) (5) (*infra*, pp. 79–80), governing service on "an officer or agency of the United States," then proper service requires personal delivery to the "officer[s]" (*i. e.*, the Commissioners), and it is not enough to serve by mail or to deliver a copy of the summons and complaint to a subordinate not authorized to accept service. If the proper provision is Rule 4 (d) (1) (*infra*, p. 78–79, concerning service "Upon an individual other than an infant or an incompetent person," service can be made only by physical delivery to the defendant personally, "or by leaving copies thereof at his dwelling house * * * with some person of suitable age * * * then residing therein," "or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." There is nothing in this record or the pertinent statutes and regulations which provides that a Regional Director of the Commission is authorized to receive process on behalf of the Commissioners in actions such as the present one. Cf. *Mecartney* v. *Hoover*, 151 F. 2d 694 (C. A. 7); *Appalachian Electric Power Co.* v. *Smith*, 67 F. 2d 451 (C. A. 4).

Whichever Rule is applicable here, it is plain that proper personal service was not effected on the Commissioners as individual officers alleged to have exceeded their statutory authority.

B. THE DISTRICT COURT LACKS JURISDICTION TO GRANT THE DECLARATORY RELIEF REQUESTED BY PETITIONER

In any event, assuming that the District Court below has *in personam* jurisdiction over the Commissioners and that venue was properly laid, we submit that that court lacks jurisdiction to grant petitioner the relief requested against the respondents. That relief is, primarily, a declaratory judgment that petitioner is entitled to reinstatement to his position and to the pay he has lost by reason of his discharge.

In providing for a judicial determination of rights by a Federal court in "a case of actual controversy within its jurisdiction," the Declaratory Judgment Act (28 U. S. C. 2201) manifestly did not purport to require the adjudication of every disputed issue, or every class of controversy. In order to proceed under that Act, the controversy must be justiciable (*Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), must not solicit an advisory or speculative pronouncement (*Coffman* v. *Breeze Corps.*, 323 U. S. 316), and must relate to a situation where the need is immediate, rather than remote or uncertain (*United Public Workers* v. *Mitchell*, 330 U. S. 75). Moreover, an application for a declaratory judgment is addressed to the sound discretion of the court, which should be exercised only "where the interests of justice will be advanced and an adequate and effective judgment may be rendered"

(*American Federation of Labor* v. *McAdory*, 325 U. S. 450, 462). And especially where governmental action is involved this discretion must be cautiously exercised in the public interest. See *Eccles* v. *Peoples Bank*, 333 U. S. 426, 431, 434.

Further, nothing in the Declaratory Judgment Act or in its legislative history suggests that the Act was intended to make reviewable administrative action which for reasons of statute or policy was not previously reviewable. Thus, administrative action which is not yet reviewable because of failure to exhaust administrative remedies is not made reviewable by the Declaratory Judgment Act. *Macauley* v. *Waterman S. S. Co.*, 327 U. S. 540; *Federal Power Commission* v. *Arkansas Power and Light Co.*, 330 U. S. 802.

The Declaratory Judgment Act simply provided a new and additional remedy in situations where the courts could already grant relief. As this Court recently stated in *Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667, 671-2:

> "The operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240. Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, "jurisdiction" means the kinds

> of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act. * * * But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified.

It follows, therefore, that the Declaratory Judgment Act is applicable herein only in so far as the Louisiana District Court would otherwise have jurisdiction of the subject matter.[30]

In Point I, A, *supra*, pp. 18–21, we reviewed the well settled principles of law concerning the power of the courts to interfere with the tenure, selection, and removal of public officials and employees. We there pointed out that the judiciary possesses no general supervisory power over such issues and that the question of the sufficiency of the reasons for discharge of a federal officer or employee is not justiciable. We noted, however, that the courts have intervened to provide judicial relief where the discharge was contested on the ground that compliance was not had with the procedural steps required by statute or regulation. In such circumstances, money judgments have been entered against the United States in the Court of Claims, and appropriate relief has been afforded against the offending executive officer in the District Court

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[30] See also *Putnam* v. *Ickes*, 78 F. 2d 223 (C. A. D. C.), certiorari denied, 296 U. S. 612; Borchard, *Declaratory Judgments* (2d ed. 1941), pp. 232–234.

for the District of Columbia. Accordingly, whether petitioner may here obtain declaratory relief depends upon whether the District Court below has the same jurisdiction possessed by the Court of Claims and the District Court for the District of Columbia.

With respect to that part of petitioner's prayer for relief which asks for a declaration that petitioner is entitled to a money judgment for his salary, we have already shown in Point I, B, *supra*, pp. 21–23, that the district courts do not have jurisdiction, under 28 U. S. C. 1346 (d) (2), of the subject matter of such suits. It follows that the district courts lack jurisdiction to give declaratory relief in lieu of money judgments, and it has so been held. *Di Benedetto* v. *Morgenthau*, 148 F. 2d 223 (C. A. D. C.), certiorari denied, 326 U. S. 686; *Almour* v. *Pace*, Pike & Fischer Ad. Law (2d), p. 700 (C. A. D. C.); *Love* v. *United States*, 108 F. 2d 43 (C. A. 8), certiorari denied, 309 U. S. 673; cf. *Lynn* v. *United States*, 110 F. 2d 586 (C. A. 5); *Fredericks* v. *Rossell*, 95 F. Supp. 754 (S. D. N. Y.); *Yeskel* v. *United States*, 31 F. Supp. 956 (D. N. J.); see also *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra* at 689, fn. 9.

Similarly, the district courts other than the District Court for the District of Columbia do not have jurisdiction to enforce compliance with procedural requirements relating to removal from the Government service. Putting the Declaratory Judgment Act to one side, we think it clear that,

after the employee has been discharged, a district court could compel such compliance only by an action in the nature of a writ of mandamus. Cf. *Kendall* v. *United States ex rel Stokes*, 12 Pet. 524, 613–614; see also *Levine* v. *Farley*, 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622. It has long been settled, however, that the district courts other than the District Court for the District of Columbia have no general original jurisdiction to issue the writ of mandamus. As early as *McIntire* v. *Wood*, 7 Cr. 504, this Court held that the jurisdiction of an inferior federal court to issue the writ of mandamus was confined exclusively to cases in which the writ was necessary to the exercise of their existing jurisdiction—as auxiliary to the enforcement of an order, judgment, or decree in a pending action. This ruling was reiterated in subsequent cases. *McClung* v. *Silliman*, 6 Wheat. 598; *Bath County* v. *Amy*, 13 Wall. 244; *Graham* v. *Norton*, 15 Wall. 427; *Davenport* v. *County of Dodge*, 105 U. S. 237; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore & Michigan Southern Ry. Co.*, 197 U. S. 536; *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109.

Further, this Court has rejected the once ingenious thought that lack of jurisdiction to issue a writ of mandamus can be supplied by converting the proceeding into an equitable action for a mandatory injunction. *Smith* v. *Bourbon County*, 127 U. S. 105, 112; see *Miguel* v. *McCarl*, 291 U. S. 442, 452; *White* v. *Berry*, 171 U. S. 366;

Warner Valley Stock Co. v. *Smith*, 165 U. S. 28; *Gaines* v. *Thompson*, 7 Wall. 347. Accordingly, although Rule 81 (b) of the Federal Rules of Civil Procedure has abolished the writ of mandamus and provided that relief thereby formerly available may now be obtained by appropriate action under the rules, it has uniformly been held that substantive rights are still governed by the principles formerly applied in mandamus cases. *Marshall* v. *Crotty*, 185 F. 2d 622 (C. A. 1); *Hunter* v. *United States*, 183 F. 2d 446 (C. A. 4); *Petrowski* v. *Nutt*, 161 F. 2d 938 (C. A. 9), certiorari denied, 333 U. S. 842; *United States ex rel. Vassel* v. *Durning*, 152 F. 2d 455 (C. A. 2); *Youngblood* v. *United States*, 141 F. 2d 912 (C. A. 6); *Branham* v. *Langley*, 139 F. 2d 115 (C. A. 4).[31]

It would appear, therefore, that, unless the writ of mandamus is merely a remedy rather than a proceeding which in itself confers jurisdiction on the courts, district courts other than the District Court for the District of Columbia would not have jurisdiction to enter a declaratory judgment in this type of case.

As we read the opinions of this Court, a proceeding in the nature of a writ of mandamus

[31] See also to the same effect *Fredericks* v. *Rossell*, 95 F. Supp. 754 (S. D. N. Y.); *Breiner* v. *Kniskern*, 90 F. Supp. 9 (E. D. Pa.); *McGrimley* v. *Foley*, 89 F. Supp. 10 (D. Mass.), affirmed, 180 F. 2d 1022 (C. A. 1); *Palmer* v. *Walsh*, 78 F. Supp. 64 (D. Ore.); *Kohlman* v. *Smith*, 71 F. Supp. 73 (W. D. Pa.).

is clearly more than a mere remedy employed in aid of jurisdiction otherwise possessed. Thus, this Court long ago rejected the argument that a writ of mandamus could issue if the district court acquired jurisdiction by reason of diversity of citizenship, the raising of a federal question, or by removal from the state courts. *McClung* v. *Silliman*, 6 Wheat. 598; *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109; *Rosenbaum* v. *Bauer*, 120 U. S. 450. The opinion in *McClung* v. *Silliman, supra*, is particularly revealing on this point. There, the argument was made that the district court [then the circuit court] had jurisdiction under Section 11 of the Judiciary Act of 1789, 1 Stat. 73, 78, because of diversity of citizenship, and that the writ could be issued as auxiliary to the exercise of its jurisdiction. The Court observed that (6 Wheat. at 601):

> It is now contended, that as the parties to this controversy are competent to sue, under the 11th section, being citizens of different states, that this is a case within the provisions of the 14th section, and the circuit court was vested with power to issue this writ, under the description of a "writ not specially provided for by statute," but "necessary for the exercise of its jurisdiction." The case certainly does present one of those instances of equivocal language, in which the proposition, though true in the abstract, is, in its application to the subject, glaringly incorrect. *It cannot be denied,*

that the exercise of this power is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it. It must exercise this power, and compel the emanation of the legal document, or the execution of the legal act by the register of the land-office, or the party cannot sue. [Emphasis added.]

In accord with the reasoning of these cases, it has been held since the enactment of the Declaratory Judgment Act that, even though the court possessed the power to issue the writ in appropriate cases, the court could not grant a declaratory judgment if the circumstances of the case rendered the writ inapplicable. *Doehler Metal Furniture Co. Inc.* v. *Warren*, 129 F. 2d 43 (C. A. D. C.), certiorari denied, 317 U. S. 663, rehearing denied, 317 U. S. 708. In that case, a dispute arose as to the extent of the liability owed by the plaintiff to the Government on a Government contract. The contract provided that if the plaintiff failed to make deliveries by specified times, the Government could terminate plaintiff's right to proceed, make substitute purchases, and hold plaintiff liable for the excess cost occasioned the Government. The Government eventually did cancel the contract and purchased additional supplies elsewhere which would have cost it $82,607.77 under the contract. The Comptroller Gen-

eral in his settlement of the claim determined that the actual cost to the Government was $104,290.19. Plaintiff contended, however, that the actual cost to the Government was $94,881.57, and brought suit in the District of Columbia against the Comptroller General for a declaration of his rights.

The Court of Appeals noted first that the dispute involved only a question of fact. It was not alleged that there was no basis for the determination of the Comptroller General, that there was no room for judgment or discretion, or that the use of plaintiff's figure was a ministerial duty. Thus, the court was "being asked to disturb what is, in essence, a finding of fact, or an exercise of discretion." (129 F. 2d at 44.) The court then observed that (*id.* at 45);

> As has been indicated, there is, ordinarily, no judicial scrutiny of the General Accounting Office. The judiciary has confined its control over the Comptroller General, so far as we know, to writs of mandamus and mandatory injunctions, and such judicial compulsion is not a common occurrence.
>
> It is clear that this complaint would not support a prayer for a writ of mandamus. Plaintiff carefully states that it wants no such action. Nonetheless it argues that the Comptroller General is suable in the District Court under the declaratory judgment Act.

Continuing, the court stated that (*id.* at 45):

> The declaratory judgment is basically a type of relief which it is hoped will further the ever present struggle of making justice more just. It is an added number in a court's repertoire from which to choose the appropriate help for a party. Likewise, the existence of another adequate remedy does not foreclose the use of a declaratory judgment where it is otherwise appropriate. The declaratory judgment Act, however, does not increase the jurisdiction of the federal courts, in the sense that, if a court has not had power over certain subject matter or over certain persons, the declaratory judgment Statute does not give it.

And, pointing out that (*id.* at 45):

> * * * the only jurisdiction the District Court has ever had over the actions of the Comptroller General is that of mandamus. Mandamus is one of the extraordinary writs. It in itself is a special remedy. That a court has jurisdiction in certain extreme situations does not mean that it has a generic supervisory and appellate jurisdiction.

the court concluded that (*id.* at 45): "the power to issue writs of mandamus does not give a court such general jurisdiction over the agency or subject matter as to enable it to choose another form of relief, the declaratory judgment, for cases in which the writ of mandamus itself could not be issued." *Accord: United States ex rel. Jordan* v.

Ickes, 143 F. 2d 152 (C. A. D. C.), certiorari denied, 320 U. S. 801.[22]

In the instant case, as in that case, the courts have no generic supervisory and appellate jurisdiction over the discharge of federal employees (see *supra*, pp. 18–21). The only jurisdiction a court might exercise to compel an executive officer to comply with procedural requirements laid down by statute or regulation in effectuating the removal of a Government employee is, after the employee has already been discharged, in the nature of a writ of mandamus. Accordingly, if, as we believe, the *Doehler Metal Furniture Co.* case, *supra*, pp. 64–66, correctly states the relationship between mandamus and declaratory judgment, it is a necessary conclusion that the Louisiana district court cannot enter a declaratory judgment because it has no general original jurisdiction in the nature of a writ of mandamus.[23]

[22] In *Putnam* v. *Ickes*, 78 F. 2d 223, 226, certiorari denied, 296 U. S. 612, the Court of Appeals for the District of Columbia said: "We think it is clear from any reasonable construction of the acts that the Declaratory Judgment Act has not given the courts jurisdiction over any controversy that would not be within their jurisdiction if affirmative relief were being sought."

[23] In this connection, it is pertinent to observe that, in our view, this Court's decisions in *McGrath* v. *Kristensen*, 340 U. S. 162, and *Perkins* v. *Elg*, 307 U. S. 325, support the argument here advanced. Basic to the Court's ruling in those cases that a declaratory judgment could be entered by the District Court for the District of Columbia was the fact that the cases were appropriate ones for the issuance of a writ of mandamus—that the decree sought would not interfere with the exercise of executive discretion (340 U. S. at 169–171).

The lower courts have so held in cases similar to the one at bar. In *Marshall* v. *Crotty*, 185 F. 2d 622, the First Circuit recently held "that a district court lacking jurisdiction [to give a declaratory judgment] by way of mandamus, is likewise without jurisdiction to give a declaratory judgment determining the reinstatement rights of a former U. S. government employee" (p. 628). District courts have ruled the same way. *E. g.*, *Palmer* v. *Walsh*, 78 F. Supp. 64 (D. Ore.); *Breiner* v. *Kniskern*, 90 F. Supp. 9 (E. D. Pa.); *Fredericks* v. *Rossell*, 95 F. Supp. 754 (S. D. N. Y.); *Kohlman* v. *Smith*, 71 F. Supp. 73, 76 (W. D. Pa.). See also *Hopkins* v. *Wallin*, 179 F. 2d 136, 137 (C. A. 3).[34]

We have shown in Point I, C, *supra*, pp. 26–37, that nothing in Section 10 of the Administrative Procedure Act, including subsection (b),[35] was

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[34] The District Court for the District of Columbia would, of course, have jurisdiction to enter a declaratory judgment in such a case since it has the power to issue a writ of mandamus. Cf. *Borak* v. *Biddle*, 141 F. 2d 278 (C. A. D. C.), certiorari denied, 323 U. S. 738.

[35] Section 10 (b) provides:

"(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

designed to alter this long-existing rule that the district courts other than the District of Columbia court have no jurisdiction to issue writs of mandamus or mandatory injunctions in cases such as this. For the same reasons, we think it clear that the Act did not empower these courts to issue declaratory judgments instead of mandamus. They are not "courts of competent jurisdiction" with respect to this type of proceeding. This Court has previously held that provisions of the Judicial Code which conferred jurisdiction upon the district courts in cases involving diversity of citizenship, a Federal question, and removal from State courts, did not grant them general jurisdiction in the nature of mandamus (*supra*, pp. 63–64). There is even less reason to believe that Congress intended to depart from its established policy when it passed the Administrative Procedure Act.

III

RESPONDENTS DID NOT WAIVE THEIR DEFENSES OF IMPROPER VENUE, LACK OF JURISDICTION *IN PERSONAM*, AND WANT OF JURISDICTION TO GRANT THE RELIEF REQUESTED

Petitioner further argues that, even if venue was improperly laid in the District Court below and that court lacked jurisdiction over the persons of the Civil Service Commissioners, those defenses were waived by respondents. This contention, we submit, is groundless.

The record plainly shows that respondents raised the defenses of improper venue and want of jurisdiction at every possible stage. Prior to the filing of an answer, respondents moved to dismiss the complaint because of improper venue and lack of jurisdiction (R. 3). After this defense was denied, respondents filed an answer which re-urged those defenses in two ways. In particular, the answer denied that A. J. Leach, Regional Director, Tenth Civil Service Region, represents the Commission for the service of process so as to bring the Commission or its members within the jurisdiction of the court (R. 17–18). And by way of separate defense, the answer specifically reasserted respondents' objections to venue and jurisdiction (R. 17, 19–20). Finally, after petitioner moved for summary judgment, respondents filed a counter-motion for summary judgment, together with a motion which again presented the defenses of improper venue and lack of jurisdiction (R. 4).

Certainly, as a factual matter, it cannot be said that respondents intended to waive those defenses. Nor did they waive them as a matter of law.

Rule 12 (b) of the Rules of Civil Procedure expressly provides that objections to venue or jurisdiction may be made by answer or by motion. Here, it was done by both. In these circumstances, it is clear that, having made its objec-

tions to venue or jurisdiction by motion, a defendant does not waive his defenses by answering on the merits or by going on to a trial on the merits if the defenses are denied. Cf. *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, 525, and cases there cited; *Gaines* v. *Gaines*, 157 F. 2d 521 (C. A. D. C.); *Orange Theater Corp.* v. *Rayherstz Amusement Corp.*, 139 F. 2d 871 (C. A. 3), certiorari denied, 322 U. S. 740; *Blank* v. *Bitker*, 135 F. 2d 962 (C. A. 7); *Vilter Mfg. Co.* v. *Rolaff*, 110 F. 2d 491 (C. A. 8); *Massachusetts Farmers Defense Committee* v. *United States*, 26 F. Supp. 941 (D. Mass.); *Klein* v. *Hines*, 1 F. R. D. 649 (N. D. Ill.); *Federal Landlords Committee, Inc.* v. *Woods*, 9 F. R. D. 622 (S. D. N. Y.).[20]

Petitioner urges, however, in reliance on *Merchant Heat & Light Co.* v. *J. B. Clow & Sons*, 204 U. S. 286, that respondents waived these defenses by affirmatively asking for a summary judgment. The contention is that "lack of jurisdiction of the person is waived by seeking relief similar to that requested by the other party." (Pet. p. 16). That assertion results from an over-broad reading of the ruling in the *Merchant Heat & Light Co.* case, *supra*. In that case, the

[20] Accordingly, it is legally irrelevant that, after respondents raised its objections to venue and jurisdiction by motion on June 1, 1948 (R. 3), and by answer on August 2, 1949 (R. 3), respondents, pursuant to an order of the court dated August 11, 1949 (R. 3), filed a record of the administrative proceedings had in this case (R. 3–4).

defendant moved to quash the return of service, and, after it was overruled, pleaded the general issue and also a recoupment or set-off of damages in excess of the amount ultimately found due to the plaintiff (204 U. S. at 289). The Court assumed, first, that "the defendant lost no rights by pleading to the merits, as required, after saving its rights" (*id.* at 289), but observed that the defendant "by setting up its counterclaim * * * became a plaintiff in its turn, invoking the jurisdiction of the court in the same action and by invoking submitted to it." (*Id.* at 289). The Court pointed out (*id.* at 289–290) that the defendant, if he elected to sue upon his affirmative claim in the same action, assumed "the position of the actor and must take the consequences"; especially since he was wholly free to interpose his claim or to bring a separate suit. The case stands only for the proposition that a defendant cannot be permitted to invoke the jurisdiction of the court for affirmative relief and deny it afterwards. Cf. *Texas & Pac. Ry. Co.* v. *Eastin & Knox*, 214 U. S. 153, 159–160.

In the instant case, however, respondents did not ask for affirmative relief. Respondents' motion for a summary judgment was not, as in the *Merchant Heat & Light Co.* case, *supra*, in effect the institution of a cause of action against petitioner, but merely the equivalent of a motion to

dismiss on the ground that petitioner does not state a cause of action." Moreover, the motion for a summary judgment was made in the alternative with the motion to dismiss for improper venue and lack of jurisdiction, and it is the latter motion that the district court acted upon (R. 23). Accordingly, respondents did not become plaintiffs in the action and did not themselves invoke the jurisdiction of the court. The court below correctly decided that there had been no waiver.[38]

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[37] Compare Rule 12 (b) of the Federal Rules of Civil Procedure which states that "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 * * *." Similarly, in such circumstances, Rule 12 (c) provides that a motion for judgment on the pleadings shall be treated as a motion for summary judgment.

[38] In any event, there can be no doubt that the question of whether the District Court below lacked jurisdiction to give the declaratory relief requested by petitioner is still open. Rule 12 (h) of the Federal Rules of Civil Procedure expressly provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." In this connection, it may be noted that respondents' motion to dismiss contended "that the plaintiff seeks orders of a mandatory nature which the United States District Courts outside of the District of Columbia have no jurisdiction to grant," and that respondents so urged in their briefs in the courts below.

IV

THE CHANGE OF VENUE PROVISION OF 28 U. S. C. 1406 (a) IS INAPPLICABLE

Lastly, petitioner contends that, if venue was improperly laid in the District Court below, the court erred in not transferring the case to the District Court for the District of Columbia, pursuant to 28 U. S. C. 1406 (a), which states that:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

" At the time this suit was brought, Section 1406 (a) provided that the court "shall" transfer such case to any district or division in which it could have been brought. As amended on May 24, 1949 (63 Stat. 101), Section 1406 (a) now vests discretion in the court to make the transfer "if it be in the interest of justice." Although the original form of Section 1406 (a) apparently made such transfer mandatory, the legislative history of the 1949 amendment reveals that Congress did not so intend. Thus, the House Committee on the Judiciary stated: "This section removes an ambiguity in section 1406 (a) of title 28, U. S. C., by substituting 'may' for 'shall', thus making it clear that the court may decline to transfer a case brought in the wrong district under circumstances where it would not be in the interest of justice to make such transfer." H. Rept. No. 352, 81st Cong., 1st Sess., p. 14; see also S. Rept. No. 303, 81st Cong., 1st Sess., p. 4. In any event, since the amended version was in force at the time respondents' first motion was denied on June 13, 1949, that language and not the original form of Section 1406 (a) is herein applicable. Cf. *Untersinger* v. *United States*, 87 F. Supp. 532 (S. D. N. Y.), affirmed, 181 F. 2d 953 (C. A. 2); *Orr* v. *United States*, 174 F. 2d 577, 580 (C. A. 2).

Petitioner asserts that respondent Guerre is not an indispensable party to the action, and that the action could, therefore, have been brought originally in the District of Columbia (Pet. pp. 9–10).

We think it unnecessary for this Court to decide the question thus posed by petitioner. Even assuming that respondent Guerre is not an indispensable party, the decision of the court below denying transfer is correct on another ground.* It is hornbook law that transitory actions, such as the present one, must begin with proper service upon the defendant, and that, when they do not, the judgment is a nullity. *Pennoyer* v. *Neff*, 95 U. S. 714. Necessarily, therefore, the change of venue provision of 28 U. S. C. 1406 (a) must be predicated on the supposition that the transferring court has jurisdiction over the person of the defendant. If it does not have that jurisdiction, clearly it does not possess the power to confer that *in personam* jurisdiction upon another court. In an analogous situation, this Court pointed out that "In all cases in which the doc-

*Since the action was dismissed without prejudice, petitioner can, of course, institute a new action in the District of Columbia. If the employing agency be deemed an indispensable party, petitioner can obtain jurisdiction over the Veterans Administration by naming the Veterans Administrator a party defendant instead of respondent Guerre, the Regional Manager of the Veterans Administration, who has no independent statutory authority but is delegated authority by the Veterans Administrator.

trine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 506–507. And, after the enactment of the doctrine of *forum non conveniens* into federal law in 28 U. S. C. 1404 (a), the Court again noted that "§ 1404 (a) of the Code deals with the right to transfer an action properly brought." *Ex parte Collett*, 337 U. S. 55, 60.[41] These observations by the Court, with respect to Section 1404 (a), are, we believe, equally pertinent as to Section 1406 (a).

Since, as we have shown above, pp. 47–53, 55–56, the District Court lacked jurisdiction *in personam* because of improper service, and since timely objection was made thereto, *supra*, pp. 69–73, we submit that Section 1406 (a) has no application here.[42]

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[41] See also, to the same effect, *Shapiro* v. *Bonanza Hotel Co., Inc.*, 185 F. 2d 777 (C. A. 9); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (C. A. 2).

[42] If Section 1406 (a) were applicable, the case could not be transferred to the District Court for the District of Columbia without eliminating from the case petitioner's prayer for a declaration that he is entitled to the pay he has lost by reason of his separation. As the suit now stands, it could not have been brought originally in the District Court for the District of Columbia since that court also has no jurisdiction in this respect, under 28 U. S. C. 1346 (d) (2). Cf. *Shapiro* v. *Bonanza Hotel Co., Inc.*, 185 F. 2d 777 (C. A. 9); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (C. A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys.

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APPENDIX

1. The pertinent sections of Title 28, United States Code are as follows:

> § 1346 (d) The district courts shall not have jurisdiction under this section of:
>
> * * * * *
>
> (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States. [As amended, P. L. 248, 82d Cong., 1st Sess.]
>
> § 1391 (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.
>
> § 1406 (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

2. The pertinent Federal Rules of Civil Procedure are as follows:

> 4 (d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the com-

plaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

* * * * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United

States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

* * * * *

4 (f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

* * * * *

12 (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading,

he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * * * *

12 (h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

3. Section 10 of the Administrative Procedure Act (Act of June 11, 1946, 5 U. S. C. 1009) provides, in pertinent part, as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW. Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION. The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS. Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *

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